

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT
UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT

2013 SEP 23 PM 3: 44

In re Motions To Disclose Aggregate Data
Regarding FISA Orders and Directives

LEEANN FLYNN HALL
Case Nos. MUEH-13-03, 08-04,
13-05, 13-06

Motion of Dropbox, Inc. For Leave To File Amicus Curiae Brief

Dropbox, Inc. ("Dropbox") moves for leave to file the accompanying amicus curiae brief in support of the motions for declaratory judgment filed in the above-captioned cases by Google Inc., Microsoft Corporation, Facebook, Inc., and Yahoo! Inc.

Counsel for the government and for each of the parties has consented to the filing of Dropbox's amicus brief. No party or counsel for a party participated in the drafting of this brief or made any monetary contribution to it. For these reasons, and those set out in the attached brief, Dropbox respectfully asks the Court to allow its amicus brief to be filed.

* * *

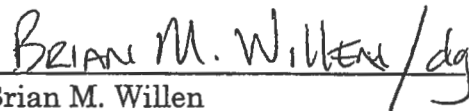
Pursuant to Rule 7(i) of the Rules of this Court, Dropbox states that none of its undersigned counsel holds security clearances. Dropbox's counsel of record in this matter, Brian Willen, is a member in good standing of the bars of The District of Columbia (SBN 490471) and the State of New York (SBN 4191730). David H. Kramer is a member in good standing of the bar of California (SBN 168452). Dropbox's in-house counsel, Bart Volkmer, is a member in good standing of the bar of California (SBN 223732).

Dated: September 23, 2013

Respectfully submitted,

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UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT

In re Motions To Disclose Aggregate Data
Regarding FISA Orders and Directives

Case Nos. Misc. 13-03, 13-04,
13-05, 13-06

**[Proposed] Order on Motion of Dropbox, Inc. For Leave To File Amicus
Curiae Brief**

Now before the Court is the motion of Dropbox, Inc. to file an amicus curiae brief in the above-captioned cases. Dropbox has an interest in these cases, and all the parties have consented to the filing of Dropbox's proposed brief. Accordingly, it is hereby ordered that Dropbox's motion for leave to file an amicus curiae brief is **GRANTED**.

SO ORDERED, this __ day of _____, 2013.

United States Foreign Intelligence Surveillance Court
Washington, D.C.

Certificate of Service

I hereby certify this 23rd day of September, 2013, that at or before the time of filing this submission, the Government (care of the Security and Emergency Planning Staff, United States Department of Justice) has been served by hand delivery and electronic mail with a copy of this motion pursuant to Rule 8(a) of the FISC Rules of Procedure, on the following:

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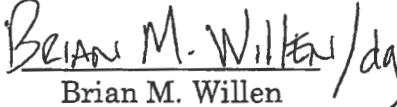
I further certify that I caused to be served a copy of the foregoing motion, together with the accompanying brief *amicus curiae*, on the following persons by electronic mail:

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UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT

In re Motions To Disclose Aggregate
Data Regarding FISA Orders and
Directives

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) Case Nos. Misc. 13-03, 13-04, 13-
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***Amicus Curiae* Brief of Dropbox, Inc. In Support of Service
Providers' Motions to Publish Information About National-Security
Requests**

*"Secrecy in government is fundamentally anti-democratic . . .
Open debate and discussion of public issues are vital to our
national health."*

— *New York Times Co. v. United States*, 403 U.S. 713, 724
(1971) (Douglas, J., concurring)

Dropbox, Inc. ("Dropbox") respectfully submits this *amicus curiae* brief to support the motions filed by Google, Microsoft, Yahoo, and Facebook (the "Service Providers") seeking the Court's permission to publish the number of national-security requests they have received and the number of users affected by those requests. Dropbox has an interest in these motions because the government has told Dropbox that it isn't allowed to publish exactly how many national-security requests, if any, it receives. Instead, the government will permit Dropbox to provide information about national-security requests only if those requests are lumped together with regular law-enforcement requests and, even then, only in bands of 1,000. Because Dropbox received fewer than 100 regular law-enforcement requests last year, reporting in the government's format would *decrease* Dropbox's ongoing transparency efforts.

There is no statute, nor any other law, supporting the government's demands. To the contrary, the proposed gag order violates the First Amendment, as it interferes with both the public's right to obtain truthful information about a matter of substantial public debate and service providers' rights to publish such

information. For these reasons, Dropbox supports the Service Providers' motions and asks the Court to confirm that all online services may publish accurate information about the number of national-security requests received within a reporting period, along with the number of accounts affected by those requests.

1. Dropbox And Its Interest In These Proceedings

Dropbox is a service that empowers people to store their documents, photos, videos, and other materials online and to access and share them from anywhere. Dropbox is committed to protecting the privacy of the hundreds of millions of people who use its service, and to disclosing data about any law-enforcement requests that seek user information.

Since May 2012, Dropbox has published a Transparency Report (available at <https://www.dropbox.com/transparency>) that includes the total number of requests for user information that Dropbox receives each year and the number of accounts affected by those requests. Dropbox's Transparency Report does not currently include national-security requests. That's because the government demands that services like Dropbox disclose only the aggregate number of *all* law-enforcement and national-security requests they receive. Even if presented that way, the government insists that the disclosures must be reported in bands of 1,000.

The government's approach harms public debate and discussion, without any societal benefit. To see why, consider Dropbox's most recent Transparency Report, which discloses the following information about the law-enforcement requests Dropbox received in 2012:

Reporting Period	Country	Requests for user information	Accounts specified
January to December 2012	United States	87	164

Had Dropbox received just one national-security request during that period, and had it wished to include that single request in its report, the government's approach would require Dropbox's Report to look like this:

Reporting Period	Country	Requests for user information	Accounts specified
January to December 2012	United States	1-1000	1-1000

Reporting in that way *decreases* transparency. It would shed almost no light on the data requests Dropbox receives, and could foster the impression that Dropbox received many more national-security requests than it did. It would also obfuscate the number of law-enforcement requests Dropbox received in 2012, many of which were not sealed and are in the public record. Because Dropbox is unwilling to distort its reporting this way, it instead must omit information about the number of national-security requests. That result is bad for the public. Dropbox would prefer to report any national-security requests in the same way it reports law-enforcement requests: by publishing the total number of requests received over a given period along with the number of affected accounts.

Dropbox's desire to disclose this information is consistent with the government's own transparency initiatives. On August 29, 2013, the Director of National Intelligence (DNI) announced that for five different kinds of national-security authorities, the Intelligence Community "will release the total number of orders issued during the prior twelve-month period, and the number of targets affected by these orders." *Press Release*, Director of National Intelligence James R. Clapper, DNI Clapper Directs Annual Release of Information Related to Orders Issued to Telecom Providers Under National Security Authorities (Aug. 29, 2013), *available at* <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/922-dni-clapper-directs-annual-release-of-information-related-to-orders-issued-under-national-security-authorities>.

Unfortunately, the government has prohibited online services that wish to report on these requests from providing the same level of transparency. That is a harsh result for services that receive few government requests, or none at all. The government's position leaves these services unable to respond to concerns that such

requests are routine and widespread.¹ For that reason, the Court's ruling on these motions will impact Dropbox and similarly situated services.

2. Barring Service Providers From Truthfully Reporting The Number of National Security Requests Made By The Government Violates The First Amendment

Recent events have ignited a heated debate about the government's use of its powers under the Foreign Intelligence Surveillance Act and similar laws. Online services like Dropbox, and the people who use them, have a right to participate fully in this debate because they are directly affected by the government's activities. Service providers may be asked to provide information in response to government demands, and those providers often face questions about whether they are doing enough to protect users' privacy. At a minimum, people want to know how often information housed on those services is handed over to the government. That is a legitimate request, and providers should be allowed to respond to it by disclosing the number of national-security requests they receive.

The government has no authority supporting its claim that the law prevents services from disclosing this information. Even if it did, allowing the government to silence this speech would violate the First Amendment rights of online services and people who use them. The First Amendment provides "special protection against orders that prohibit the publication or broadcast of particular information or commentary." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976). And the Supreme Court has made clear "that First Amendment protection extends equally to right to receive information." *Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 386-87 (1998).

The government is violating these rights by ordering private parties to keep quiet on an important matter involving the government's conduct. In doing so, it is preventing the public from learning basic facts about how the government is using its national-security powers. A prior restraint on speech like that is "the most

¹ Many people have written to Dropbox over the past few months asking about Dropbox's involvement with national-security requests from the government.

serious and the least tolerable infringement on First Amendment rights,” *Stuart*, 427 U.S. at 559, and faces a “heavy presumption against its constitutional validity,” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

The only way the government can prevail on these motions would be to show that its proposed gag order is “narrowly tailored” to protecting national security and that there are no “less restrictive alternatives” that would be equally effective. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Freedman v. Maryland*, 380 U.S. 51, (1965). Accord *In re National Security Letter*, __ F. Supp. 2d __, 2013 WL 1095417 (N.D. Cal. 2013) (applying these standards in holding that prohibitions on disclosing information about National Security Letters violated the First Amendment). The government cannot come close to showing that.

The government’s effort to silence online services and thereby keep the public in the dark is not at all tailored to protecting national security. No harm to national security can be expected from the Service Providers releasing accurate information about the number of national-security requests that have been made. The government is planning on releasing similar information itself. The proposed disclosures would not reveal the substance of any request nor identify any subscriber who was the target of such a request. We are talking here simply about aggregate numbers that should have been made public months ago.

The Court should not permit the government to invoke the mere label of “national security” to justify the speech restraints it seeks—especially not here, where the speech will inform the public about the government’s use of its national-security powers. As Justice Black observed when the Supreme Court rejected the government’s effort to block publication of the Pentagon Papers: “The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.” *New York Times v. United States*, 403 U.S. at 719 (Black, J., concurring).

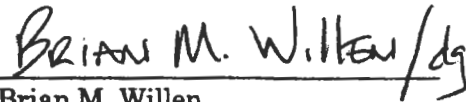
Conclusion

For these reasons, Dropbox asks the Court to grant the Service Providers' motions and, in doing so, to make clear that online services have a First Amendment right to publish accurate information about how many national-security requests they receive and how many user accounts are implicated.

Dated: September 23, 2013

Respectfully submitted,

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Handwritten signature of Brian M. Willen in black ink, with a stylized 'dg' at the end.

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Certificate of Service

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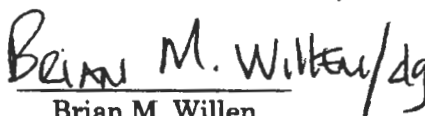
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